

Hayat (Migration) [2023] AATA 3998 (20 November 2023)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Azmat Hayat
CASE NUMBER:	2218044
HOME AFFAIRS REFERENCE:	BCC2020/2001717
MEMBER:	Peter Booth
DATE:	20 November 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 20 November 2023 at 9:17am

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus document – bank letter – allegations against bank – no compassionate or compelling circumstances – decision under review affirmed

LEGISLATION

*Migration Act 1958, ss 5(1), 65, 359, 424
Migration Regulations 1994, Schedule 2 cl 500.217; Schedule 4, Public Interest Criterion 4020; r 1.03*

CASES

*Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 21 November 2022 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicant applied for the visa on 31 July 2020. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 500.217 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
8. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given, a bogus document or information that is false or misleading in a material particular?

9. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no

requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

10. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
11. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

BACKGROUND

12. The applicant applied for a student visa (Subclass 500) on 31 July 2020.
13. In support of that student visa application, he provided a sanction of loan for study purposes letter from HBL Bank dated 26 August 2020 and signed by the branch manager. The HBL Bank letter dated 26 August 2020 stated that Mr Muhammad Hayat had received a loan of INR four million for the purpose of 'bear[ing] all the living, traveling and educational expenses of his Son, Mr Azmat HAYAT' (the HBL Bank letter).
14. Department investigations concluded that the HBL Bank letter was a bogus document and invited the applicant to comment on 26 April 2022.
15. On 25 May 2022 and 26 May 2022, the applicant's migration agent provided a response requesting an extension of four weeks to investigate the issue with the overseas bank and other documents in support of the application. No further submissions were provided addressing the bogus document.
16. On 21 November 2022 the delegate refused the applicant's student visa application on the basis that the HBL Bank letter was a bogus document.
17. On 8 December 2022 the applicant applied to this Tribunal for a review of that decision.
18. By letter dated 21 September 2023 the Tribunal wrote to the applicant and invited him to comment on the HBL Bank letter.
19. In reply the applicant provided a letter to the Tribunal. It is dated 12 October 2023 and in the following terms:

I am very thankful to the AAT for giving me an opportunity to comment and provide documents required to prove that I never had an intention to provide any bogus documents or mislead the Department.

Please refer to the attached documents which clearly show that my family had a full financial capacity to support my study plan here. My family assets and financial documents prove that they have good tie ups with home country and hence there was never any need on their or my part to provide any bogus document. I want to emphasize that I had no intention of submitting any fraudulent documents or misleading information to the Department.

I acknowledge that on 31/07/2020, I lodged an application for a Student (Class TU Subclass 500) visa electronically via the internet. As was mentioned in the natural justice letter issued

by the Department of Home Affairs; *"With the application, you provided a copy of a HBL bank letter dated 26/08/2020 certifying that Mr Muhammad Hayat had received a loan of PKRfour million (4,000,0000) for the purpose to 'bear all the living, traveling and educational expenses of his son, Mr Azmat HAYAT', the applicant for this visa application."*

Further adding to this department affirmed that *"Investigations conducted by the Department confirmed, via reliable authorities, that the bank letter was a bogus document. You are therefore suspected of having provided a bogus document in support of your student visa application for the purpose of satisfying the financial requirement for the grant of a Student visa."*

I truly understand that it is a requirement for the grant of a Student (subclass 500) visa that the *"applicant satisfies Public Interest Criterion (PIC) 4020 contained in clause 4020 of Schedule 4 to the Migration Regulations 1994.*

Subclause 4020(1) requires that there is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Administrative Appeals Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

- *the application for the visa; or*
- *a visa that the applicant held in the period of 12 months before the application was made."*

The bank had no concern when the document was issued as all the requirement for bank were met in a legitimate manner; however, when immigration tried to verify the status of financial document; the bank official simply backed off. Unfortunately, corruption has reached to an utmost level where bank official's try to make money for trivial matters.

THE HEARING

20. The applicant gave evidence at the hearing, the substance of which was as follows.
21. The applicant had read the delegate's decision dated 21 November 2022 refusing his application for a student visa.
22. The applicant understood that the issue for determination was whether he had supplied a bogus document.
23. The Tribunal proceeded to ask the applicant some questions, the substance of which and his responses were as follows.
24. The applicant agreed that:
 - a) he made a student visa application on 31 July 2020
 - b) on 26 August 2020, in support of the application, he provided the HBL Bank letter
 - c) the Department considered the document to be bogus and invited him to comment
 - d) he did not provide a substantive response to that invitation
 - e) the delegate concluded that he had supplied a bogus document and his student visa application was refused on that basis
 - f) in his letter dated 12 October 2023 to the Tribunal he provided a response in relation to the impugned document.

25. The Tribunal asked the applicant whether he agreed that the HBL Bank letter was a bogus document. He said "I don't agree it's a bogus document, my father was in the army, he paid to the HBL Bank. I asked for money, he went to the bank and got the sanction of the loan. He got the document, the man at the bank said we want you to give us money, if you need the loan, so we can process. My father tried to contact the bank manager, they'll send good and they gave him the HBL letter is that the loan was approved. My dad gave me the letter, the Department checked and it was nothing like that, they had revenge on us for no reason". He was asked whether he was asserting that the HBL Bank letter was genuine or not. He said "I don't know, comment in the Department says it is not". The Tribunal said that if he was asserting that it was a genuine letter he would need to establish proof of that. He said "I cannot, that is what happened, my dad is not an educated person".
26. When asked who lodged the student visa application he said "I did it with the help of a friend". He was asked whether he provided the HBL Bank letter in support of his student visa application. He said "yes". When asked where he obtained the letter he said "from my father".
27. The Tribunal asked the applicant whether his father was alive and well. He said "yes". He was asked why his father has not provided an explanation of the circumstances of obtaining the HBL Bank letter. He said "I told him the document was bogus".
28. The Tribunal asked the applicant why this explanation was being provided for the first time. He said "I didn't know the document was bogus".
29. He was asked why this explanation was not contained in his letter dated 12 October 2023. He said "I will explain on the phone and in person".
30. He was asked why he did not provide this explanation to the Department when he was invited to do so. He said "I was stressed and depressed". The Tribunal informed the applicant that it found his answers difficult to accept. He said "I relied on the agent".
31. When asked whether he had anything further to add in support of his application for review the applicant said "I told my father the document was bogus, I did not tell him it had a bad effect on me. He said what can I do now, he went to the bank and the person was not there, my father could not find him. My agent said I needed to show funds in the account, we got funds from proper channel, and I called and I told my dad. He said he would get the money, he sold a part of land, and I have shown the documents to you".
32. The Tribunal informed the applicant that a non-disclosure certificate had been issued by the Department.
33. He was informed that the Department file contains a certificate issued pursuant to s 375A of the Act. It is dated 13 December 2022 and is in respect of two documents provided to the Tribunal by the Department. The certificate states that disclosure of the information would be contrary to the public interest. The basis of the certificate is that the documents contain details of how the Department conducts internal investigation processes. The certificate is issued pursuant to s 375A which gives the Minister such a power. The first issue that the Tribunal had to determine is whether the certificate is valid. In the Tribunal's view the certificate is valid because it identifies the documents and information and explains the reason why disclosure would be contrary to the public interest.
34. Accordingly the applicant was informed that the information and documents cannot be disclosed to him.

35. However he was informed that the Tribunal is also obliged to give him clear particulars of information which may be adverse to his application. This arises from ss 359A and 424A. There is a tension between the requirement of non-disclosure pursuant to s 375A and the obligation to disclose adverse information in other sections of the Act.
36. The Tribunal informed the applicant that the documents contain internal discussions about his case and the bogus document.
37. The Tribunal informed the applicant that ultimately the delegate published his decision in which he refused the application on the basis of a bogus document. That decision is the subject of this application for review however because this is a de novo review the underlying deliberations are not relevant and the Tribunal informed the applicant that it would not take it into account in determining his matter. This matter will be heard by the Tribunal and a fresh decision made, the previous decision of the Department being now irrelevant.
38. In summary therefore the Tribunal accepts that the information and documents should not be disclosed on the basis of public interest. However the limited number of documents which are an issue, in the Tribunal's view are not relevant to the determination of the application and it would not have regard to them.
39. The applicant was informed that he may want an opportunity to consider these matters and to make submissions about the certificate and the documents. He was asked how he wanted to proceed. He did not respond directly but replied by explaining the circumstances of obtaining the HBL Bank letter. It was clear that he did not take issue with the certificate.

CONCLUSION

40. The Department investigations concluded that the HBL Bank letter was a bogus document. The delegate also concluded that it was a bogus document. The applicant did not respond to an invitation issued by the Department to explain why the HBL Bank letter was not a bogus document. When invited to explain his position by the Tribunal he produced a letter dated 12 October 2023. The applicant did not clearly state his position in that letter. Rather he referred to the findings of the Department and ultimately stated: "The bank had no concern when the document was issued as all the requirement for bank were met in a legitimate manner; however, when immigration tried to verify the status of financial document; the bank official simply backed off. Unfortunately, corruption has reached to an utmost level where bank official's try to make money for trivial matters". At the hearing he was invited to agree or disagree with the conclusion of the delegate, namely that the HBL Bank letter was a bogus document. He responded by saying that he disagreed and provided an explanation about how his father attended the bank and was asked to provide some money in order to procure the letter. The inference was that this was a bribe and certainly his father did not agree to pay the money. However whilst he has refused to concede that the document was bogus he has not explained to the Tribunal's satisfaction why it should be considered to be a genuine document. There is no testimony from his father, and no confirmation from the bank that the letter is genuine. The applicant has not explained how the refusal of a bribe could make the letter a bogus document. The applicant's position is a mere assertion that the letter is genuine. This is most unconvincing. On the material before the Tribunal the uncontradicted evidence is that the HBL Bank letter is a bogus document. The Tribunal is not satisfied that the applicant has explained why the HBL Bank letter should be treated as a genuine document. The Tribunal is satisfied that the HBL Bank letter purported to have been but was not issued in respect of the applicant's father or is counterfeit and therefore is a bogus document within the meaning of that term set out in s 5(1)(a) of the Act.
41. The impugned document was provided in support of the student visa application made on 31 July 2020. It was purported to be proof of the assertion in the application that the applicant

had sufficient funds and that the funds would be provided by one of the applicant's parents. The ability of an applicant to be able to fund the study including tuition and living expenses is an important part of the decision to grant the applicant a visa. Accordingly the Tribunal is satisfied that the impugned document was provided in relation to the application for the student visa in question.

42. The applicant did not contend that the document was provided by the agent. Indeed he stated that he made the application himself with the assistance of a friend and that he provided the HBL Bank letter which had been provided to him by his father. The applicant is responsible for the visa application including documents (see ss 98–103 of the Act). PIC 4020(1)(a) requires that there be no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth a 'bogus document', as defined in s 5(1). There is no requirement that the provision of the document be deliberately bogus or for an enquiry into the state of mind of the applicant or of his representative. It is the fact of providing a document which satisfies the definition that is sufficient to enliven the consequences.
43. The Tribunal is satisfied that the applicant does not meet PIC 4020(1).
44. Therefore, PIC 4020(2) is not met.

Should the requirements of PIC 4020(1) or (2) be waived?

45. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen (as defined in reg 1.03 of the Regulations), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
46. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
47. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
48. The applicant did not advance any reason why the requirements of PIC 4020 should be waived, either before or during the hearing. Further the Tribunal is not aware of any:
 - a) compelling circumstances that affect the interests of Australia, or
 - b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen,
49. that justify the granting of the visa.
50. Therefore the requirements of PIC 4020(1) should not be waived.
51. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217.

DECISION

52. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Peter Booth
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...